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No. 90-656

IN THE

Supreme Court of the United States

October Term 1990

DALE LYNN BREWER,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Whether the Court of Appeals was required to consider Petitioner's sufficiency of the evidence contention before reversing for trial error.

LIST OF PARTIES TO PROCEEDING IN COURT OF APPEALS

Dale Lynn Brewer
Danny Franklin Johnson
Marshall Mitchell
Joseph Edward Parr
William Jerry Pruett
Franklin D. Schmick
United States of America
Ken Vodron

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IN THE

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October Term 1990

No.

DALE LYNN BREWER,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, Dale Lynn Brewer, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit rendered in these proceedings on June 19, 1990. Petitioner's Petition for Rehearing was denied July 24, 1990.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 904 F.2d 936.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered June 19, 1990. Petitioner's Petition for Rehearing was denied July 24, 1990.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION, FIFTH AMENDMENT, DOUBLE JEOPARDY CLAUSE

"Nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb. . ."

STATEMENT OF THE CASE

Jurisdiction in this federal criminal case is founded upon 18 U.S.C. § 3231. Petitioner was charged in three counts of a multi-count, multi-defendant indictment charging conspiracy to violate and substantive violations of federal firearms laws. He was convicted of all three counts in a jury trial, and was sentenced to five years confinement on each count to run concurrently.

Petitioner appealed his conviction, contending, *inter alia*, that the evidence against him was legally insufficient to sustain his conviction on counts 2 and 3 of the indictment, which alleged receipt and possession of a destructive device, and that his conviction on all counts was tainted by evidence offered in violation of *Bruton v. United States*, 391, U.S. 123 (1968).

The United States Court of Appeals for the Fifth Circuit reversed Petitioner's convictions on all counts on the grounds that reversible *Bruton* error had occurred when an extrajudicial statement by co defendant Vodron, who did not testify, was introduced against Petitioner. The court failed to reach the sufficiency of the evidence issue as to Brewer, stating, "In light of this holding we do not address Brewer's other claims."

(Opinion, p. 8.) The sufficiency claims of the other appellants were reached. In the sole ground of his Petition for Rehearing, Petitioner requested the court to reach and decide the sufficiency of the evidence issue. The petition for rehearing was summarily denied.

The relevant sections of Petitioner's appellate brief and Petition for Rehearing, supporting Petitioner's assertion that the sufficiency of evidence issue was properly raised, are reproduced in the appendix to this petition.

REASONS FOR GRANTING THE WRIT

I. THE APPELLATE COURT'S ACTION IN THIS CASE IS AT ODDS WITH THE POLICIES OF THIS COURT AND THE PRACTICE OF OTHER CIRCUITS

In *Burks v. United States*, 437 U.S. 1, 18 (1978), this court determined that when a case is reversed on appeal because the evidence was legally insufficient, "the only 'just' remedy . . . is the direction of a judgment of acquittal." A defendant whose case has been reversed for legal insufficiency cannot, consistent with the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, be retried.

Since that time, the policy of this court has been that sufficiency of the evidence questions must be considered on appeal in order to enforce this right not to be retried. For example, in *Tibbs v. Florida*, 457 U.S. 31, 45 (1982), this court referred to "our belief that state appellate judges faithfully honor their obligations to enforce applicable state and federal laws" with respect to the *Burks* rule as a reason for *permitting* retrials when evidentiary sufficiency is lacking under a less restrictive standard than that in *Burks*. In *Hudson v. Louis-*

iana, 450 U.S. 40 (1981), this court held that notwithstanding the fact that the petitioner there had moved for a new trial on the grounds of insufficient evidence, no new trial could be had when reversal of the conviction was predicated on that ground: the right to be free from double jeopardy was not waived by the request for a new trial.

While this court has never specifically stated that legal sufficiency questions must be reached, Justice Brennan's concurrence in *Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294, 321-322 (1984) clearly articulates the necessity for this ruling as a corollary to the *Burks* rule:

> [W]hen a defendant challenging his conviction on appeal contends both that the trial was infected by error and that the evidence was constitutionally insufficient, the court may not, consistent with the rule of *Burks*. . ., ignore the sufficiency claim, reverse on grounds of trial error, and remand for retrial.

To hold otherwise, Justice Brennan points out, would require the conclusion that "the defendant in *Burks* was simply fortunate that the reviewing court *chose* to provide him with a judicial 'determination that the evidence was insufficient to support a conviction,' *ante*, at 309, and did not instead rely on an alternative ground of reversal. . . I cannot agree that the protections of the Double Jeopardy Clause depend so heavily on the grace of a reviewing court." *Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294, 319 (1984).

The Courts of Appeals which have articulated policies on this issue, (including the Fifth Circuit) have uniformly held that

> [W]here it is claimed on appeal from a federal conviction that the evidence is insufficient, the reviewing court is required to decide the sufficiency question even though there might be other grounds for reversal which would preclude the retrial.

Delk v. Atkinson, 665 F.2d 90, 93 note 1 (6th Cir. 1981). The Fifth Circuit held in *United States v. Meneses-Dvila*, 580 F.2d 888, 896 (5th Cir. 1978), "Since this ground of reversal permits the Government to retry defendant, we must reach defendant's sufficiency of the evidence argument, because the Government may not retry defendant if the evidence at the first trial was insufficient." Similarly, in *United States v. Till*, 609 F.2d 228, 229 (5th Cir.) *cert. denied* 445 U.S. 955 (1980), the court ruled, "Because the Double Jeopardy clause prevents retrial if the Government did not rebut defendant's proof of entrapment [citation to *Burks*], this issue must be decided before the case is remanded." See also *Cordova v. Lynaugh*, 838 F.2d 764, 766 (5th Cir.), *cert. denied* 486 U.S. 1061 (1988) (Order of retrial moots all other claims except insufficiency of evidence, which implicates double jeopardy concerns.) Thus, the Fifth Circuit's actions in this case are contrary to the stated rulings of that court.

The Sixth and Seventh Circuits hold that the sufficiency issue should be considered *first* because the outcome of this issue affects the right to retry the appellant. In *United States v. Aarons*, 718 F.2d 188, 189 (6th Cir. 1983), the court held, "Where the sufficiency of the evidence is properly before us, we consider that issue first because it is determinative of whether the appellant may be retried." And in *United States v. Vargas*, 583 F.2d 380, 383 (7th Cir. 1978), the court noted, "Because a holding that the evidence was not sufficient to support the verdict would preclude a retrial [citations omitted], it is important to consider initially defendant's argument that the Government's evidence was insufficient." See also *United States v. Watson*, 623 F.2d 1198, 1200 (7th Cir. 1980).

Other cases relying on the principle that the appellate court must reach the sufficiency issue include *United States v. Gibbs*, 904 F.2d 52, 56 note 1 (D.C. Cir. 1990) (case reversed for failure to instruct on lesser included offense but sufficiency

ruling required); *United States v. Mason*, 902 F.2d 1434 (9th Cir. 1990) (case reversed for jury charge error but sufficiency ruling required); *United States v. Quinn*, 901 F.2d 522 (6th Cir. 1990) (reversal for trial error but suffiency ruling required); *United States v. Gonzalez-Sanchez*, 825 F.2d 572, 588 note 56 (1st Cir.) *cert. denied sub nom. Latorre v. United States*, 484 U.S. 988 (1987) ("Even if the appellate court finds alternate grounds for reversal it must consider the defendant's challenge to this [sic] sufficiency of the evidence to ensure that the prohibition against double jeopardy is upheld"); *United States v. Fitapelli*, 786 F.2d 1461 (11th Cir. 1986) (double jeopardy clause requires review of sufficiency issue); *United States v. McKoy*, 771 F.2d 1202 (9th Cir. 1985) (case reversed for prosecutorial misconduct but sufficiency review required); *United States v. Morris*, 612 F.2d 483, 492 (10th Cir. 1979), *after remand United States v. Jelsma*, 630 F.2d 778 (10th Cir. 1980), (case reversed for verdict error but sufficiency considered "since, if the evidence is insufficient, a retrial would violate the double jeopardy principle of the Fifth Amendment.")

See also *United States v. Lewis*, 787 F.2d 1318, 1323 (9th Cir.), *reh. denied* 798 F.2d 1250 (9th Cir. 1986), *after remand* 862 F.2d 748 (9th Cir. 1988), *cert. denied* 109 S.Ct. 1169 (1989); *United States v. DiCesare*, 765 F.2d 890, 900 (9th Cir.) *amended* 777 F.2d 542 (9th Cir. 1985); *United States v. Orrico*, 509 F.2d 113, 116 (6th Cir. 1979); *Palmer v. Grammer*, 863 F.2d 588, 592 (8th Cir. 1988); *United States v. Prieskorn*, 658 F.2d 631 (8th Cir. 1981); *United States v. Palzer*, 745 F.2d 1350, 1354 (11th Cir. 1984); *United States v. McManaman*, 606 F.2d 919, 927 (10th Cir. 1979), *after remand* 653 F.2d 458 (10th Cir. 1981)

The Fifth Circuit's ruling in this case avoided the weight of this precedent not by enunciating a different rule, but *sub silentio* — by simply failing to comment on the fact that a suf-

ficiency issue existed in Petitioner's case. The Fifth Circuit's ability to take this course arises in part because of the lack of an authoritative holding by this court requiring the sufficiency issue to be reviewed. Such a ruling would clarify the requirements of *Burks* and would avoid the need to depend, as Justice Brennan put it, "on the grace of a reviewing court." *Justice of Boston Municipal Court v. Lydon*, 466 U.S. 294, 319 (1984).

II. THE FIFTH CIRCUIT'S ACTION IN THIS CASE CAUSES NEEDLESS LITIGATION AND REQUIRES THE SUPERVISORY POWERS OF THIS COURT

The granting of certiorari is appropriate where "a United States court of appeals . . . has so far departed from the accepted and usual course of judicial proceedings . . . as to call for the exercise of this Court's power of supervision." Supreme Court Rule 10.1(a). in *McNabb v. United States*, 318 U.S. 332, 340 (1943), this court held, "Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence." Similarly, in *Palermo v. United States*, 360 U.S. 343, 345 (1959), it was held that this court has the "power, in the absence of statutory provision, to prescribe procedures for the administration of justice in the federal courts."

This doctrine has been followed to justify the exercise of jurisdiction in numerous other cases. *Jencks v. United States*, 353 U.S. 657 (1957) (Power used to hold that trial court was required to order the production of prosecution witness statements for the defense; *Marshall v. United States*, 360 U.S. 310 (1959) (Power exercised to order grant of new trial after jurors were exposed to prejudicial publicity); *Mesarosh*

v. United States, 352 U.S. 1 (1956) (Power exercised to order grant of new trial because of prejudicial publicity); *Rea v. United States*, 350 U.S. 214, 217 (1956) (Power exercised to enjoin federal agent from using wrongfully obtained evidence in state court prosecution); *Offutt v. United States*, 348 U.S. 11, 13 (1954) (Power exercised to supervise procedure in contempt case): *United States v. Mitchell*, 322 U.S. 65 (1944) (Power used to clarify *McNabb* rule); *Ballard v. United States*, 329 U.S. 187, 192 (1946) (Power used to dismiss indictment because of exclusion of women from grand jury.) See also *Hobby v. United States*, 468 U.S. 339 (1984), wherein this court acknowledged the continued viability of the supervisory function while declining to exercise it in that case.

The consequences of the practice followed here are clearly demonstrated in the Fifth Circuit case of *United States v. Sneed*, 705 F.2d 745 (5th Cir. 1983). In *Sneed*, the case was reversed after the first trial for jury selection error. (*United States v. Hawkins*, 658 F.2d 279 (5th Cir. 1981)) The defendant raised a double jeopardy claim on appeal but the appellate court failed to resolve it. The defendant then filed a pretrial double jeopardy motion before his seconed trial, which was denied by the trial court. On the second appeal, the Court of Appeals held that the prior appellate panel's failure to resolve this issue did not permit the inference that the issue had been resolved against the appellant. Therefore, the court in *Sneed* was required to consider the issue on a pretrial interlocutory appeal. Thus, because the appeals court failed to address the issue the first time it was raised, Sneed was required to re-present the contention to the trial court, then to file a new appeal, with a new record, new briefs, and so forth, to obtain resolution of an issue which, had it been initially resolved on appeal, would have barred any further proceedings. On the *second* appeal, the appellate court held that the evidence had indeed been insufficient at the first trial, and ordered the indictment dismissed.

Petitioner is in the same position as Sneed with regard to the two affected counts of the indictment. He has already presented his insufficiency contention to the trial court through a motion for instructed verdict which was denied. Unless this case is remanded to the Fifth Circuit with instructions to consider the sufficiency issue, he will be required to present the issue to the trial court again by way of a pretrial motion before submitting to retrial. He will then be entitled to appeal the court's ruling prior to the entry of judgment. *Abney v. United States*, 4341 U.S. 651 (1977). It should be noted, however, that the filing of notice of appeal does not automatically stay the trial proceedings. *United States v. Dunbar*, 611 F.2d 985 (5th Cir.), *cert. denied*, 447 U.S. 926 (1980); *United States v. Patterson*, 809 F.2d 244 (5th Cir. 1987). Thus, the Court of Appeals' failure to address the sufficiency issue which was properly raised on direct appeal may force the Petitioner to undergo a second trial before the issue is resolved, when a favorable resolution would have prevented a retrial. It is difficult to imagine a more complete deprivation of the appellant's right against double jeopardy, or a more complete waste of the strained resources of the criminal justice system.

Sneed demonstrates that petitioner's situation is not unique, as does *Eaves v. United States*, Sup. Ct. docket no. 89-1013, *cert. denied* 110 S.Ct. 1129 (1990), which was before this court last term on a similar issue. This variability in treatment of sufficiency of the evidence issues is both inequitable and inefficient, and therefore presents an appropriate situation for the imposition of a uniform procedure.

III. THIS CASE PRESENTS A CLEAR OPPORTUNITY FOR THIS COURT TO ARTICULATE A NECESSARY COROLLARY TO THE *BURKS* RULE

As the extracts from the record below included in the Appendix indicate, this case presents the issue of the necessity for deciding sufficiency of the evidence questions on appeal in a pristine form. There is no question that the issue of the evidence to convict was squarely raised by both parties. The Court of Appeals expressly declined to consider it.

Unlike the defendant below in *Gibbs v. Pennsylvania*, Sup. Ct. doc ket no. 89-134, *cert. denied* 110 S.Ct. 403 (1989), the defendant here did not contend that the court should exclude the evidence ruled inadmissible by the appellate opinion in conducting the sufficiency review. Rather, the sufficiency issue here was framed in terms which would allow the court of appeals to consider all evidence admitted by the trial court in assessing sufficiency. Further, the *Gibbs* case involved a state court of last resort. This court's legitimate concern with giving deference to state courts does not apply in this federal criminal case. Rather, the federal criminal defendant has a due process interest in the uniform application of the federal law throughout the United States. *McNabb v. United States*, 318 U.S. 332, 340(1943).

Nor does this case present the difficulty of *Eaves v. United States*, Sup. Ct. docket no. 89-1013, *cert. denied* 110 S.Ct. 1129 (1990), where the original reversal was for indictment error. There, the bringing of a new indictment may well moot the sufficiency issue. Here, by contrast, the indictment remains intact and the reversal related to evidentiary issues only.

This court's decision of this issue will not require this court to determine whether the evidence was legally sufficient at this time but will only require a remand to the court of appeals for its decision; this court need not decide now whether the legal sufficiency of evidence in this case is an issue worthy of review by this court. In reviewing this issue, this court will not be breaking new ground in the sense of providing a new challenge to a conviction. Rather, this court will simply bring the circuits into uniformity with the practice of the majority, a result which fairness requires.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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APPENDIX

UNITED STATES of America,
Plaintiff-Appellee,

v.

Franklin D. SCHMICK, Joseph Edward Parr, William Jerry Pruett, Danny Franklin Johnson, Marshall Mitchell, Ken Vodron, and Dale Lynn Brewer,
Defendants-Appellants.

No. 89-1174.

United States Court of Appeals,

Fifth Circuit.

June 19, 1990

Appeal from the United States District Court
for the Northern District of Texas.

Before WISDOM, JOHNSON, and DUHE, Circuit Judges.

DUHE, Circuit Judge:

Franklin D. Schmick, William Jerry Pruett, Ken Vodron, Danny Franklin Johnson, Dale Lynn Brewer, Joseph Edward Parr, and Marshall Mitchell appeal their convictions for conspiring to violate various federal firearms laws. We affirm in part and reverse and remand in part.

Trial established the following sequence of events: On April 30, 1983 a member of the Bandido Motorcycle Club was fatally shot by a member of the Banshee Motorcycle Club. On

May 1, 1983 Ronald Jerome Hodge, National President of the Bandidos determined that revenge on the Banshees would be carried out by Bandido national officers. He ordered all Bandido members to clean up their appearances in order not to attract attention of law enforcement officers during the implementation of the retaliatory action.

The funeral for the felled Bandido took place in Houston, Texas on May 4, 1983. The following day Hodge presided over a meeting of Bandido national officers in Houston. Present at the meeting were National Vice President Alvin Chester Frakes; National Secretary-Treasurers William Jerry Pruett and Franklin D. Schmick; and National Sergeants at Arms Ken Vodron, Joe Edward Benavides, Crandle Phillip Lamonte Presnel, Adams Otis Fisher, and John Randal Hanson. Though no specific plan of retaliation was formulated during this meeting, the purpose of the meeting was to begin or organize a systematic plan for killing as many Banshees as possible.

Hodge instructed the men to gather intelligence on the Banshees in order to discover their schedules, where they lived, and how they spent their leisure time. To facilitate retaliation, Hodge ordered his men to obtain unregistered firearms that could be disposed of after the retaliatory action without being traced. Schmick and Pruett were to collect $100 from each Bandido member to finance the retaliation. Fisher was to set up a safe house in north central Texas, where there was no Bandido Club, in the event the police were in pursuit of any member after the retaliation had taken place. Hodge also established a coded message system to facilitate confidential communication. Following the meeting, club members went to Vodron's house to choose assignments. Hanson, Presnel, and Benavides were assigned to carry out the scheme in the Dallas area, and Vodron was assigned to South Louisiana.

On approximately May 11, Presnel, Hanson, and Steven

Glen Ryals, a member of the Lubbock chapter, drove in Pruett's station wagon from Lubbock to Dallas to meet Benavides and James Thomas Atkins, president of the Amarillo chapter, in order to conduct surveillance of the Dallas Banshees. After two othree days Benavides and Atkins left Dallas, and Hanson, Presnel, and Ryals left on May 18th. Upon returning to Lubbock, either Hanson or Benavides delivered to Pruett assessment money collected in the Dallas/Fort Worth area.

On June 8th or 9th, 1983, Hanson, Benavides, Glen Alan Wilhelm, a National Sergeant at Arms, and Keith Allen Miller, President of the Nomad chapter, drove from Lubbock to Houston in Pruett's station wagon to attend a national officers' meeting. The men took with them numerous guns and rifles. The meeting was moved on June 13th to Longview, Texas to a location near the home of Raymond Douglas Shirley, President of the Longview chapter. Attending this meeting were Hanson, Vodron, Schmick, Pruett, Presnel, Benavides, Frakes, Hodge, Fisher, Miller and Shirley; also present were Edgar Allen Crochet, President of the Southwest Houston and Louisiana chapters; Glen Alan Wilhelm and Danny Franklin Joshnson,National Sargeants at Arms; and Dale Lynn Brewer, President of the Houston Cloverleaf chapter. Longview chapter members Marshall Mitchell, Terry Lee Larque, and Joseph Edward Parr provided security outside the building in which the meeting took place.

At this June 13 meeting Schmick distributed enlarged phctographs of various members of the Banshee Motorcycle Club. Johnson and Wilhelm had maps of Texarkana and had devised a plan to kill all persons present in the Texarkana Banshee clubhouse by going overland and opening fire into the club with machine guns. Mitchell was to be the get-away driver. Johnson and Wilhelm had in their possession at Shirley's

house two MAC-10 machine guns illegally converted to fire fully automatic, and they openly displayed several loaded MAC-10 clips. The Dallas team had not yet devised a specific retaliatory plan.

On June 20, 1983 Hanson, Vodron, Benavides, and Presnel drove to Dallas and there located the homes of the Banshees who were to be targets of the retaliation. During this Dallas trip, approximately on June 21, Benavides asserted that they should bomb the houses in whichi the targeted Banshees lived; Presnel, Vodron, and Hanson agreed. On June 24 or 25 Vodron went to Houston to obtain the necessary explosives, which he stole from a tool box on a company truck. However, Vodron was unable to return to Dallas because he had injured himself, so he sent Brewer in his stead. Brewer arrived in Dallas with two cannisters of explosives.

On June 26 or 27 Benavides, Presnel, Brewer, and Hanson, in the possession of explosives, pistols, blasting caps, a MAC-10 automatic machien gun, and hand grenades, drove to Longview to Shirley's house where Johnson and his team were preparing for the Texarkana assault. In Longview Benavides, Mitchell, Brewer, Hanson, and Presnel tested the blasting caps. Shortly thereafter Brewer and Presnel left Longview. Hanson, Benavides, and Larque remained in Longview and constructed two bombs in a trailer in which Parr lived on the edge of Shirley's property. Parr assisted by obtaining various parts necessary for the construction.

On July 1, in a rental car obtained by Mitchell, Benavides and Hanson drove from Longview to Dallas, where they met Brewer and Presnel. On July 3 the four conducted a dry run of the bombings and test-fired a machine gun, to which the men had attached a silencer. The gun had been illegally modified to fire fully automatic. The bombings occurred in the early morning hours of July 5th. Benavides planted one bomb underneath a van belonging to a Banshee; Presnel stood guard with the MAC-10 machine gun. Hanson planted the other bomb

next to the gas meter attached to a house belonging to another Banshee; Brewer stood guard with the MAC-10 machine gun. Both bombs subsequently detonated, resulting in some property damage but no serious personal injuries. Johnson and Wilhelm did not follow through on their planned attack on the Banshees' Texarkana clubhouse.

Following the bombings Hanson and Benavides left for Rapid City, South Dakota in the vehicle Mitchell had rented for them. Brewer and Presnel drove to Corpus Christi to attend a motorcycle racing event organized by the Bandidos. The Corpus Christ event had long been planned to be used as an alibi for those Bandidoes who actually conducted the retaliatory operations.

Twenty three Bandidos were indicted on March 31, 1988 for their participation in the conspiracy. A superseding indictment was filed September 22, 1988. The sixteen defendants remaining at the commencement of trial pled not guilty. Hanson, Shirley, and Fisher were the government's chief witnesses. After the government rested, the trial court granted the government's motion to dismiss the charges against six of the defendants. The jury found the appellants (seven of the nine remaining defendants) guilty of Count 1 of the indictment, which charged that they conspired to possess and receive illegally made and unregistered firearms in violation of 18 U.S.C. § 371. Brewer was found guilty of Counts 2 and 3, which charged that they had knowingly and unlawfully received and possessed illegally made and unregistered firearms in violation of Chapter 53, Title 26 of the United States Code. Vodron and Parr were found guilty of aiding and abetting in the commission of the offenses charged in Counts 2 and 3.

Superseding Indictment

[1, 2] The defendants contend that the superseding indictment, brought more than five years after the last alleged overt act, was barred by the statute of limitations because it broaden-

ed or substantially amended the original indictment. The return of a timely indictment tolls the statute of limiations as to the charges alleged therein. 18 U.S.C. § 3282. *United States v. Elliott*, 849 F.2d 554, 561 (11th Cir.), *cert. denied*, ____ U.S. ____, 109 S.Ct. 3222, 106 L.Ed.2d 571 (1989). A superseding indictment filed while the initial indictment is pending is timely unless it broadens or substantially amends the charges made in the original indictment. *Elliott*, 849 F.2d at 561; *United Staets v. Grady*, 544 F.2d 598, 601-02 (2d Cir.1976).

[3] Notice to the defendants is the central policy underlying the limitations doctrine. *United States v. Italiano*, 894 F.2d 1280, 1282 (11th Cir.1990); *United States v. Gengo*, 808 F.2d 1, 3 (2d Cir.1986). Similarly, notice is the touchstone in deciding whether a superseding indictment substantially changes the original charges. *Gengo*, 808 F.2d at 3. A timely, pending indictment serves this purpose by apprising the defendants "that they will be called to account for their activities and should prepare a defense." *Grady*, 544 F.2d at 601. *See United States v. Marion*, 404 U.S. 307, 322-23 & n. 14, 92 S.Ct. 455, 464-65 & n. 14, 30 L.Ed.2d 468 (1971) and *Toussie v. United States*, 397 U.S. 112, 114-15, 90 S.Ct. 858, 860, 25 L.Ed.2d 156 (1970). If the allegations and charges are substantially the same in the old and new indictments, the assumption is that the defendant has been placed on notice of the charges against him. That is, he knows that he will be called to account for certain activities and should prepare a defense. *Italiano*, 894 F.2d at 1283.

[4] The original indictment identified three conspiratorial objects regarding the manufacture of, possession of, and failure to register explosive devices. 26 U.S.C. § 5861(c), (d), and (f). The superseding indictment alleged two additional conspiratorial objects relating to the possession of an illegally made and unregistered machine gun. 26 U.S.C. § 5861(c) and (d). The superseding indictment also described seven overt acts beyond the 40 detailed in the original indictment. The ap-

pellants only object to three of the seven overt acts described in the superseding indictment, those that relate to the possession of the unregistered and illegally made machine gun.

We find that the superseding indictment did not substantially amend the original indictment so as to render it untimely. The original indictment gave defendants notice that they were to defend against charges that they conspired to violate the firearms statute, 26 U.S.C. § 5861. Though the particular conspiratorial objective referenced there dealt with unregistered and illegally made explosive devices, the original indictment identified as one of the overt acts committed by the conspirators an order issued by Hodge, the National President of the Bandido Motorcycle Club, to "[o]btain 'unregistered' firearms for use in retaliatory strategies."

[5] The underlying crime charged, violation of the firearms statute, was not impermissibly broadened. The superseding indictment neither added new charges nor rendered the appellants susceptible to increased punishment. The appellants were on notice that they were accused of planning to obtain unregistered firearms. The original indictment generally referred to unregistered firearms; the superseding indictment merely further described the unregistered firearms used by the Bandidos. Where the facts alleged have not been changed, although additional underlying details have been alleged, a superseding indictment brought outside the statute of limitations is timely. *United States v. Friedman,* 649 F.2d 199, 204 (3rd Cir. 1981).

Sufficiency of the Evidence

Pruett, Mitchell, Schmick, and Parr contend that there is insufficient evidence to allow an inference that they conspired to violate federal firearms laws. The conspiracy arose on approximately June 13, 1983, at which time Wilhelm and Johnson were in possession of two MAC-10 machine guns, modified to fire "fully automatic", to be used in their Texarkana assault.

[6] In reviewing the sufficiency of the evidence, we view the evidence in a light most favorable to the government and with all resonable inferences and credibility choices made in support of the jury's verdict. *Glasser v. United Staes*, 315 U.S. 60, 80, 62 S.Ct. 457, 459, 86 L.Ed. 680 (1942). The standard of review inquires whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *United States v. Kim*, 884 F.2d 189, 192 (5th Cir.1990); *United States v. Nixon*, 816 F.2d 1022, 1029 (5th Cir.1987), *cert. denied*, 484 U.S. 1026, 108 S.Ct. 749, 98 L.Ed.2d 762 (1988). When making such a determination, "'[i]t is not necessary that the evidence exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt . . . '" *United States v. Henry*, 849 F.2d 1534, 1536 (5th Cir.1988) (quoting *United States v. Bell*, 678 F.2d 547, 549 (5th Cir.1982) (en banc), *aff'd*, 462 U.S. 356, 103 S.Ct. 2398, 76 L.Ed.2d 638 (1983)).

[7-9] A conviction for conspiracy under 18 U.S.C. § 371 requires that the government prove beyond a reasonable doubt 1) an agreement between two or more persons, 2) to commit a crime against the United States, and 3) an overt act committed by one of the conspirators in furtherance of the agreement. *United States v. Yamin*, 868 F.2d 130, 133 (5th Cir.), *cert. denied*, ____ U.S. ____, 109 S.Ct. 3258, 106 L.Ed.2d 603 (1989); *United States v. Wheeler*, 802 F.2d 778, 780 (5th Cir.), *ceert. denied*, 480 U.S. 908, 107 S.Ct. 1354, 94 L.Ed.2d 524 (1987); *United States v. Ortiz-Loya*, 777 F.2d 973, 981 (5th Cir.1985). No element need be proved by direct evidence, but may be inferred from circumstantial evidewnce. *United States v. Robles-Pantoja*, 887 F.2d 1250, 1254 (5th Cir.1989); *United States v. Ayala*, 887 F.2d 62, 67 (5th Cir.1989). An agreement may be inferred from "concert of action." *United States v. Arzola-Amaya*, 867 F.2d 1504 (5th Cir.), *cert. denied*, ____ U.S. ____, 110 S.Ct. 322, 107 L.Ed.2d 312 (1989). While the prosecution must show knowledge of and intent to join the conspiracy beyond a reasonable doubt, *United States*

v. Bland, 653 F.2d 989, 996 (5th Cir.), *cert. denied*, 454 U.S. 1055, 102 S.Ct. 602, 70 L.Ed.2d 592 (1981), it need not show that each defendant knew all the details of the conspiracy. *United States v. Parrish*, 736 F.2d 152, 157 (5th Cir.1984).

[10] We find the evidence sufficient to support the jury's findings. Pruett and Schmick were the two National Secretary-Treasurers of the Bandido Motorcycle Club. They were responsible for collecting the $100 assessments and reimbursing members for funds expended on the retaliatory scheme. Bandido President Hodge had made it clear that the retaliation was to be directed by the national officers. Schmick enlarged and distributed photographs of Banshee members at the June 13 meeting so that the assault teams could identify their victims. Government witness Fisher testified that Pruett and Schmick knew about both the Texarkana assault plan and thebombing scheme before they were to be executed. Fisher also testified that following one of the Longview meetings Hodge "held court" in a back room of Shirley's house, bringing in various Bandido members and briefing them on the progress of the retaliatory scheme on a "need to know" basis. Fisher designated Pruett and Schmick as two of the national officers present for the duration of this session. There was sufficient evidence for the jury to find beyond a reasonable doubt that Pruett and Schmick knew that the retaliatory scheme would involve illegal machine guns and explosive devices and that their actions promoted the conspiracy's illegal objective.

Mitchell and Parr, though not national officers of the Bandido Motorcycle Club, were members of the Longview chapter. Many of the conspiracy's decisive events transpired in Longview. Government witness Shirley, President of the Longview chapter at the time of the conspiracy, testified that members of the Longview chapter knew that bombs were to be used in the Dallas retaliation plan. As Longivew was the base of operations for the retaliatory scheme, Longview

chapter members gathered supplies, clips, ammunition, and guns for the men involved in the actual acts of retribution.

Mitchell, Vice-President and later President of the Longview Chapter, was assigned to the Texarkana assault team. His role was to drive the get-away car after the overland machine gun assault on the Banshee Clubhouse. The two other members of Mitchell's team, Johnson and Wilhelm, were in possession of the two illegally converted MAC-10 machine guns. It stands to reason that Mitchell knew about the existence of the guns. Furthermore, Mitchell assisted Benavides and Hanson in testing blasting caps for use with the bomb they built in Longview. We find that there was sufficient evidence from which the jury could legitimately infer that Mitchell was cognizant of the object of the conspiracy.

Parr lived in a trailer at the back of Shirley's propety in Longivew. It was in this trailer the bombs were built. Parr assisted in building the bombs by fetching various parts and tools requested by Benavides, Larque, and Hanson. Indeed, Parr made purchases three separate timers for the bombs. We find that a jury could have reasonably determined that Parr conspired to receive and possess illegal firearms and that he aided and abetted the receipt and posession of the bombs as alleged in the indictment.

Alibi Instruction

Appellants Brewer and Vodron argue that the district court committed reversible error by refusing to give an alibi instruction. Brewer presented the testimony of Ed Cox, a friend of Brewer's who spent a good deal of time in Brewer's motorcycle repair shop in Houston during the sumemr of 1983. Cox testified that he spent as many as five days a week in Brewer's shop rebuilding a motorcycle and that he did not recall Brewer's having left Houston for any significant period of time in the latter part of June 1983. Cox did recall that Brewer left town for the July 4th weekend. Brewer points to this testimony

as corroborating his own testimony that he did not travel to Dallas on June 25 and as contradicting Hanson's testimony. Brewer contends that Hanson's testimony provided the only evidence that Brewer participated in the conspiracy and possessed the bombs. Vodron argues that Brewer's alibi defense was integral to his defense insofar as Vodron denied having ordered Brewer to travel from Houston to Dallas with the explosives.

[11] As a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor. *Mathews v. United States*, 485 U.S. 58, 108 S.Ct. 883, 8878, 99 L.Ed.2d 54 (1988). "'It has long been well established in this Circuit that it is reversible error to refuse a charge on a defense theory for which there is an evidentiary foundation and which, if believed by the jury, would be legally sufficient to render the accused innocent.'" *United States v. Rubio*, 834 F.2d 442, 446 (5th Cir.1988) (quoting *United States v. Lewis*, 592 F.2d 1282, 1285 (5th Cir.1979)). *See also United States v. Johnson*, 872 F.2d 612, 622 (5th Cir.1989); *United States v. Grapp*, 653 F.2d 189, 195 (5th Cir.1981); *United States v. Megna*, 450 F.2d 511, 513 (5th Cir.19791).

[12] Vodron's argument that he was prejudiced by the district court's refusal to give the alibi instruction is not well taken. Vodron participated in the conspiracy and aided and abetted the violation of substantive firearms laws before Brewer's alleged involvement in the Dallas operation. Vodron agreed with Benavides that bombs should be used in the Dallas retaliation, and he procured the actual explosive used to make the bombs. Thus, even had Brewer's requested instruction been given, it would not have inured to Vodron's benefit. We refrain from speculating what effect the court's refusal to give the alibi instruction had on Brewer's trial becaue we find other error dictating reversal of Brewer's conviction.

Bruton Error

[13] Brewer moved for severance or, in the alternative, a mistrial based on the admission of an incriminating extrajudicial statement made by Vodron, a nontestifying codefendant. Government witness Shirley testified that at the July 4 Corpus Christi run Vodron told him that he had gone to Houston to obtain the explosives but recruited Brewer to replace him on the Dallas team when he injured himself. The court overruled Brewer's objection to this testimony. However, on cross-examination Shirley related another statement, made by Presnel, implicating Brewer in the Dallas bombings. The court sustained Brewer's renewed objection, instructing the jury to disregard the declarations of Vodron and Presnel as they related to Brewer. The court subsequently found that the hearsay statements, though made during the existence of the conspiracy, were not made in furtherance of the conspiracy and thus were not admissible under Fed.R.Evid. 801(d)(2)(E). The court denied Brewer's motion for a mistrial. Despite the court's limiting instructions, during closing argument the prosecution referred to these declarations as corroborating Hanson's testimony regarding Brewer's participation in the scheme.

Brewer contends that the admission of statements made by Vodron and Presnel implicated him in all three counts of the indictment, corroborated Hanson's testimony, and effectively foreclosed his Sixth Amendment right to confrontation under *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). *Bruton* held that a defendant is deprived of his rights under the Confrontation Clauses when his nontestifying codefendant's confession naming him as a participant in the crime is introduced at their joint trial, even if the jury is instructed to consider that confession only against the codefendant.

We find that the admission of the extra-judicial statement made by Vodron violated *Bruton*. *United States v. Morales*,

477 F.2d 1309, 1314-16 (5th Cir.1973). The hearsay reported by Shirley directly implicated both the declarants and Brewer. *See United States v. Espinoza-Seanez*, 862 F.2d 526, 534 (5th Cir.1988) and *United States v. Lewis*, 786 F.2d 1278, 1285 (5th Cir.1986). Government witness Hanson provided the only other testimony that Brewer directly participated in the Dallas bombings, and Hanson's testimony was impeached regarding particular details of the events in Dallas. When called by Brewer during presentation of his defense, both Vodron and Presnel refused to testify, asserting their rights under the Fifth Amendment. Furthermore, during closing argument the prosecutor referred to Vodron's hearsay as corroborating Hanson's testimony. Given these circumstances, we cannot assert that the impact of the statements was insignificant in light of the weight of other evidence against the defendant. *Cruz v. New York*, 481 U.S. 186, 107 S.Ct. 1714, 95 L.Ed.2d 162 (19087); *United States v. Miliet*, 804 F.2d 853, 857-58 (5th Cir.1986). Accordingly, the trial court abused his discretion in denying Brewer's motion for new trial, and Brewer's conviction must be reversed and remanded.

In light of this holding we do not address Brewer's other claims.

For the foregoing reasons, the convictions of Schmick, Pruett, Vodron, Johnson, Parr, and Mitchell are AFFIRMED, and Brewer's conviction is REVERSED and REMANDED in accordance with this opinion.

AFFIRMED IN PART and REVERSED IN PART and REMANDED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 89-1174

D.C. Docket No. CR-3-88-077-R

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

FRANKLIN D. SCHMICK, JOSEPH EDWARD PARR, WILLIAM JERRY PRUETT, DANNY FRANKLIN JOHNSON, and MARSHALL MITCHELL, KEN VODRON, DALE LYNN BREWER,
Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Texas

Before WISDOM, JOHNSON, and DUHE, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the convictions of Schmick, Pruett, Vodron, Johnson, Parr, and Mitchell of the District

Court in this cause is affirmed in part and reversed in part, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this court.

June 19, 1990

ISSUED AS MANDATE:

U.S. COURT OF APPEALS
FILED
JUN 19 1990
GILBERT F. GANUCHEAU
CLERK

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 89-1174

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

FRANKLIN D. SCHMICK, JOSEPH EDWARD PARR, WILLIAM JERRY PRUETT, DANNY FRANKLIN JOHNSON, MARSHALL MITCHELL, KEN VODRON, and DALE LYNN BREWER,
Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Texas

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ON PETITION FOR REHEARING
(July 24, 1990)

Before WISDOM, JOHNSON, and DUHE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed on behalf of Dale Lynn Brewer in the above entitled and numbered cause be and the same is hereby denied.

CLERK'S NOTE:
SEE FRAP AND LOCAL
RULES 41 FOR STAY OF THE
MANDATE.

ENTERED FOR THE COURT:

/s/ John M. Duhe, Jr.
United States Circuit Judge

U.S. COURT OF APPEALS
FILED
JUL 24 1990
GILBERT F. GANUCHEAU
CLERK

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 89-1174

UNITED STATES OF AMERICA,
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FRANKLIN D. SCHMICK, JOSEPH EDWARD PARR, WILLIAM JERRY PRUETT, DANNY FRANKLIN JOHNSON, MARSHALL MITCHELL, KEN VODRON, and DALE LYNN BREWER,
Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Texas

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ORDER:

☐ The motion of _____ for ☐ stay ☐ recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

☒ The motion of Dale Lynn Brewer for ☒ stay ☐ recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including October 22, 1990, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall

be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

☐ The motion of _____ for a further stay of the issuance or the mandate is GRANTED to and including _____, under the same conditions as set forth in the preceding paragraph.

☐ The motion of_____ for a further stay of the issuance of the mandate is DENIED.

/s/John M. Duhe Jr.
UNITED STATES CIRCUIT JUDGE

U.S. COURT OF APPEALS
FILED
AUG 6 1990
GILBERT F. GANUCHEAU
CLERK

POINT OF ERROR NO. FIVE

THE TRIAL COURT ERRED IN FAILING TO GRANT APPELLANT'S MOTION FOR INSTRUCTED VERDICT ON COUNTS TWO AND THREE OF THE INDICTMENT, CHARGING THE RECEIPT AND POSSESSION OF A DESTRUCTIVE DEVICE, FOR THE REASON THAT THE EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW TO PROVE APPELLANT'S ACTUAL OR CONSTRUCTIVE POSSESSION.

The evidence, even when viewed in the light most favorable to the government, is insufficient to prove Brewer's actual or constructive possession of destructive devices. The trial court instructed the jury:

> *'Possession'* may be either actual possession or constructive possession. A person who knowingly has directd physical contRol over an object at a given time, has actual possession of it. A person who, although not in actual possession, knowingly has both the power and the intention, at a given time, to exercise dominion or control over an object, either directly or through another person or persons, has constructive possession of it.

(R.II-505-506.)

*Thus, in order to find the evidence against Brewer sufficient under these instructions, the jury would have to be convinced beyond a reasonable doubt that Brewer either had "direct physical control" over the devices or that he had "both the power and th- intention to exercise dominion and control over them." The conviction may not be affirmed on a theory not included in the jury instructions. *United States v. Apollo*, 476 F.2d 156, 162, n.5 (5th Cir. 1973). Thus, in determining sufficiency, this court is bound by the trial court's charge.

There is evidence of Brewer's actual possession of the devices. He was merely a passenger in the vehicle; Benavides and Hanson did the driving. (R.VI-47-48, 50.) The bombs had been placed in the *trunk* of Benavides's rental car when he and Hanson left Longview for Dallas, (R.VI-43.) There was no evidence where they were located thereafter prior to the bombing run, or that any of the co-conspirators ever told Brewer where they were prior to the bombing run, or where they were located in the Ryals Impala used in the bombing run. Because there was no evidence that the bombs were located near Brewer in the vehicle or that Brewer ever saw either of the bombs, the evidence does not show that he knowingly had "direct physical control" over them. (R.VI-51.) Even a person who clearly has knowledge of the presence of the contraband cannot be found guilty of "possessing" it absent a showing of personal dominion or control. In *United States v. Batimana*, 623 F.2d 1366 (9th Cir.) *cert. denied* 449 U.S. 1038 (1980), the court held that where drugs were delivered to one party in the presence of two others , and all three were arrested shortly thereafter, the evidence was insufficient to convict the two bystanders where, although they knew what was in the package, there was no showing they exercised any control over it.

Nor is the evidence sufficient to show constructive possession. In *United States v. Moreno-Hinojosa*, 804 F.2d 845, 847 (5th Cir. 1986), a drug case, the court held,

> To establish constructive possession, the government must show that Moreno controlled, or had the power to control, the truck or the marihuana; mere proximity to the drugs is not enough. . . Even if Moreno knew that Maldonado [the driver of the truck] was making an illegal marijuana run, this fact would not be sufficient evidence to establish his possession without an additional showing that he was

riding in the truck to participate in the possession. . .

The court went on to hold that the evidence was insufficient to establish Moreno's connection with the offense, in that there was no showing of his participation other than his presence and some suspicious statements he made at the time of his arrest. Similarly, in *United States v. Wilson*, 657 F.2d 755, 760 (5th Cir. 1981), *cert. denied* 455 U.S. 921 (1982), the court held that "'[M]ere presence in the area where the narcotic is discovered or mere association with the person who does control the drug or the property where it is located, is insufficient to support a finding of possession,'" citing *United States v. Moreno*, 648 F.2d 309, 312 (5th Cir. 1981), and *United States v. Stephenson*, 474 F.2d 1353, 1355 (5th Cir. 1973). The court found the evidence insufficient, under this standard, to show that the defendant in that case had any connection with heroin found on the ground near the spot where he and others were playing dice. *See also, United States v. Tolliver*, 780 F.2d 1177 (5th Cir. 1986), *vacated on other grnds*, 107 S.Ct. 1267 (1987).

In *Arellanes v. United States*, 302 F.2d 603, 606 (9th Cir. 1962), the court found the evidence insufficient to prove possession on the part of the wife of one of the principal actors. The mere fact that she was with him in the car where the drugs were found was held insufficient to show the possession or control required. While the "power to control" contraband may be exercised from a distance, the evidence must still show that the defendant had actual power to control. For example, in *United States v. Disla*, 805 F.2d 1340 (9th Cir. 1986), the court held the evidence insufficient to show power to control contraband where the defendant was not in personal contact with the contraband and, although he had participated in previous transactions and had made telephone calls to those who had custody of the contraband, there was no evidence as to the contents of the calls.

The testimony of the Government's own witnesses in the instant case made it clear that Brewer was simply along for the ride to act as an assistant and do what he was told, specifically to act as a look-out and hold the gun. It was Benavides and Hanson who planned and implemented the bombing scheme. Brewer was a last minute addition, brought in to act as a stand-in for Vodron. (R.VI-26-27.) Brewer was not present when the devices were constructed in Longview (R.VI-33-38), and was not shown to be a part of any of the decision-making processes. All of the decisions were made by Benavides and Hanson, (R.VI-24-25,50.), and information about the scheme was given only on a "need to know" basis and was not transmitted to the general membership. (R.VII-138-142.) Brewer was not at all involved in the transportation of the devices from Longview to Dallas. (R.VI-42-43.) When Benavides found out from the national organization that the other "teams" were not following through on their respective retaliation plans, only Benavides, Hanson and Presnel (not Brewer) were angered. [R.VI-45.) There was no showing that Brewer was anywhere near the devices before the early morning of July 5th, when Benavides and Hanson set them, nor that Brewer ever said a word during the time the devices were in existence.

The testimony of Hanson regarding the bomb-planting mission was devoid of any indication that Brewer had either the "power" or the "intention," let alone "both the power and the intention to exercise dominion or control over the" devices, as required by the court's instructions. (R.II-505-506.) According to Hanson, the setting of the devices took place around 5:00 a.m., while it was still dark. (R.VI-51-52.) Hanson, Presnel, Benavides and Brewer traveled in Ryles' Impala; Brewer had no other connection with the car. (R.VI-47-51.) Brewer sat in the front passenger seat with Hanson driving while Benavides planted the devices at the

Whitehall Lane house; Brewer sat in the back seat thereafter. (R.VI-51-51.) Hanson testified that all Brewer did during this entire episode was to get out of the vehicle and hold the gun near Hanson while Hanson planted the device and set the timer at the Trippie Road house. (R.VI-52-53.) It was Hanson who decided exactly how and where to set the device. (R.VI-52.) The four then went back in the vehicle to the DeSoto house from whence they had come. (R.VI-53.) The record is utterly lacking any evidence from which the jury could have inferred that Brewer ever touched the devices or had any authority or intention to do so.

This is in sharp contrast to cases holding the evidence sufficient to prove constructive possession. For example, in *United States v. Love*, 599 F.2d 107 (5th Cir.), *cert. denied* 444 U.S. 944 (1979), the court held that the mere fact that the defendant was a passenger in a van containing a large amount of marihuana was insufficient to convict him of possession. However, the evidence that the defendant, who was a passenger in a van containing marijuana, had agreed by word or gesture with the statement of a co-defendant that 'we' paid $2,000 for the marijuana was held sufficient to establish the necessary control. Here, there is no verbal or nonverbal statement of Brewer indicating any exercise of control over or ownership interest in the devices. Similarly, in *United States v. Flenoid*, 718 F.2d 867 (8th Cir. 1983), the court held that the defendant's presence as a passneger in a car from which weapons were recovered did not establish his possession, but testimony that the defendant reached into the location where the weapon was later found just after the police stopped the car was sufficient to indicate his control. Here, there is no showing that Brewer made any gesture or acted in any way to assert control over the bombs.

It may be argued by the government that even if the

evidence is not sufficient to convict appellant as a principal, it is still sufficient to convict him as an aider and abettor. Such a contention must fail, because neither the indictment nor the jury charge presented such a theory. In *United States v. Wilson*, 657 F.2d 755, 763 (5th Cir. 1981), *cert. denied* 455 U.S. 921 (1982), the court held, "[T]he district court gave no jury instruction on aiding and abetting in connection with Wilson. Wilson's conviction on Count 18 therefore cannot rest upon this theory." Accordingly, Wilson's conviction on that count was reversed. In *United States v. Acosta*, 763 F.2d 671, 681-682 (5th Cir. 1985), *cert. denied sub nom. Weempe v. United States*, 474 U.S. 863 (1985), the court held that while another theory was available, the convictions of defendant Donna Alford could not be upheld on an aiding and abetting theory because the jury was not charged on that theory. Similarly, the court in *United States v. Apollo*, 476 F.2d 156, 162, n. 5 (5th Cir. 1973), held,

> The Government now argues that Apollo could have been convicted as an aider and abettor under 18 U.S.C. §2. The case was not submitted to the jury on that theory. . . A conviction cannot be affirmed on appeal on a theory which was not presented to the jury.

See also *United States v. Basey*, 816 F.2d 980, 997 (5th Cir. 1987); *United States v. Medina*, 755 F.2d 1268, 1279 (7th Cir. 1985); *United States v. Bruun*, 809 F.2d 397, 405, n.9 (7th Cir. 1987).

It may also be argued by the government that appellant can be convicted of the substantive offenses under the principle of *Pinkerton v. United States*, 328 U.S. 640, 647 (1946) that proven members of a conspiracy are responsible for acts of other proven members of the conspiracy when those acts are knowingly done in furtherance of the object of the conspiracy.

The conviction can only be affirmed on this ground, however, if the jury was instructed on the *Pinkerton* theory. *United States v. Wilson*, 657 F.2d 755, 763 (5th Cir. 1981), *cert. denied* 455 U.S. 921 (1982); *United States v. Thomas*, 398 F.2d 531 (5th Cir. 1968), *on rehearing; United States v. Batimana*, 623 F.2d 1366, 1370 (9th Cir.), *cert. denied* 449 U.S. 1038 (1980); *United States v. Disla*, 805 F.2d 1340 (9th Cir. 1986).

The jury here was *not* instructed on the *Pinkerton* principle as applicable to the substantive offenses. The court's charge begins with "General instructions" and "General definitions." In the "General instructions," the court told the jury, "A separate crime or offense is charged in each of the 3 counts. *Each offense, and the evidence pertaining to it, should be considered separately.*" (R.II-503.) (emphasis added). After the general instructions, the charge continues with instructions as to each count. The specific instructions for Count 1, the conspiracy count, begin at page 7 of the charge (R.II-507) and continue through page 11 (R.II-510.) the only conceivable reference to the *Pinkerton* principle was imbedded in these instructions for the conspiracy count, where the court instructed the jury that if a defendant had been found to be a member of the conspiracy, the statements and acts of other proven members in furtherance of the conspiracy "may be considered as evidence against that defendant. . ." (R.II,-509.) Later on, the charge provides separate instructions for Counts 2 and 3, the substantive counts at issue. These instructions specifically refer the jury to the "General instructions" and the "General definitions" portions of the charge, and the Count 3 instruction also refers the jury to the instructions as to Count 2. (R.II.-511, 513.) Significantly, however, the charge on the substantive counts does not direct the jury to consider the charge on the *conspiracy* count as applicable to the *substantive* counts.

The charge in this case is thus distinguishable from those given in cases holding that the *Pinkerton* principle was fairly presented to the jury. In *United States v. Michel*, 588 F.2d 986, 999-1000, n.13 (5th Cir.), *cert. denied* 444 U.S. 825 (1979), the court held,

> We are mindful of the rule that a conviction can not be affirmed on appeal on a theory not presented to the jury. We believe, however, that the charge fairly presented the *Pinkerton* principle to the jury. The trial court instructed the jury on *two occasions* in its final charge that after they were satisfied beyond a reasonable doubt that a conspiracy existed and that a defendant was one of the members of it, then *the defendant assumed the responsibility for the acts and statements of all other members* made in furtherance of the conspiracy.

(Emphasis added.) Here, there was only *one* passing reference to the principle that evidence of acts of one coconspirator in furtherance of the conspiracy can be considered against another coconspirator. The jury was not instructed that the non-actor co-conspirator was "responsible" for those acts or that he could be convicted of substantive offenses arising out of those acts based on the conduct of the actor. Rather, the reference in this particular jury charge was clearly limited to the jury's consideration of evidence in the conspiracy count as to overt acts.

Similarly, the instruction found in *United States v. Acosta*, 763 F.2d 671, 681 n.7 (5th Cir. 1985), *cert. denied sub nom. Weempe v. United States*, 474 U.S. 863 (1985), allowed the jury to consider the acts and statements of co-conspirators as evidence against the defendant "in the case." Here, the jury's consideration of such evidence was limited by the charge to the conspiracy count. No such limitation is mentioned in

Acosta, and the "in the case" language of *Acosta* suggests that the court there authorized the jury to consider the principle generally. The instruction in *Acosta* was also far more extensive than that given here in its explanation of the principle. The instruction upheld in *United States v. Basey*, 861 F.2d 980, 997-998 (5th Cir. 1987), was even more extensive and, unlike the instruction given here, tracked the current edition of U.S. FIFTH CIRCUIT JUDGES ASSOCIATION, PATTERN JURY INSTRUCTIONS, CRIMINAL CASES. See U.S. FIFTH CIRCUIT JUDGES ASSOCIATION PATTERN JURY INSTRUCTIONS, CRIMINAL CASES, 1983 EDITION, pp. 61-63.

For the foregoing reasons, the *Pinkerton* principle cannot be said to have been fairly presented to the jury as a theory on which to base a conviction on the substantive counts, and therefore the court may not hold the evidence against appellant sufficient as to these offenses based on the acts of other co-conspirators.

Since there is no theory on which the evidence as to Counts 2 and 3 is sufficient, the convictions on these counts must be reversed.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,	§
	§
Appellee	§
	§
v.	§
	§
DALE LYNN BREWER,	§
	§
Appellant	§

PETITION FOR REHEARING

TO THE HONORABLE JUDGES OF SAID COURT:

Comes now the Appellant, DALE LYNN BREWER, who would offer this Petition for Rehearing and would show the Court as follows:

STATEMENT OF PROCEDURAL HISTORY

Appellant Brewer was convicted after a jury trial on all three counts of a superseding indictment on December 7, 1988, in the United States District Court for the Northern District of Texas, Honorable Jerry Buchmeyer, judge presiding. Appellant was sentenced by the court to five (5) years confinement on each count, the sentences to run concurrently.

Notice of Appeal was filed on July 21, 1989, after the trial court overruled Appellant's Motion for New Trial. Appellant's appeal was consolidated with that of Co-appellants Franklin

Schmick, Danny Franklin Johnson, Joseph Edward Parr, William Jerry Pruett, Marshall Mitchell, and Ken Vodron.

The appeal was submitted and orally argued on February 6, 1990. This Honorable Court issued its opinion on July 19, 990, affirming in part and reversing and remanding in part. Specifically, the conviction of Appellant Brewer in all three counts was reversed and remanded; this Court sustained Appellant Brewer's Point of Error Two involving the erroneous admission of extrajudicial admissions of non-testifying co-defendants (*Bruton* error). The Court declined to address Appellant Brewer's Points of Error Nos. 3 and 5, respectively involving jury consideration of extrinsic material and sufficiency of the evidence to sustain the conviction as to counts 2 and 3 of the superseding indictment.

GROUND FOR REHEARING

THE PANEL OPINION ERRONEOUSLY FAILED TO ADDRESS APPELLANT BREWER'S POINT OF ERROR REGARDING SUFFICIENCY OF THE EVIDENCE TO SUSTAIN HIS CONVICTION ON COUNTS 2 AND 3 OF THE SUPERSEDING INDICTMENT

ARGUMENT AND AUTHORITIES

In the panel opinion issued June 19, 1990, the Court addressed three of the five points of error raised by Appellant Brewer. The Court discussed Appellant Brewer's Point of Error No. 1 regarding the trial court's refusal to instruct the jury on his defense of alibi; this Court held that the trial court committed error but declined to assess harm. Opin. at 13-14. This Court overruled Appellant's Point of Error in the trial court's failure to dismiss count one of the superseding indictment on limitations grounds. Opin. at 6-9. This Court sustained Appellant

Brewer's Point of Error No. 2, reversing his conviction on all three counts due to the admission of extrajudicial admissions of to non-testifying co-defendants (*Bruton* error). Opin. at 14-16. The panel opinion concluded that "in light of this holding we do not address Brewer's other claims." Opin. at 16.

Among Appellant Brewer's other claims, however, was his Point of Error No. 5, in which he challenged the sufficiency of the evidence to sustain his convictions on counts 2 and 3 of the superseding indictment. Because of the double jeopardy implications of evidentiary insufficiency claims, the Appellant is entitled to consideration of this point of error prior to remand to the district court.

The double jeopardy clause of the Fifth Amendment forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding. *Burks v. United States*, 437 U.S. 1 (1978). An appellate reversal of a conviction on the basis of insufficiency of the evidence has the same effect of a judgment of acquittal; the double jeopardy clause precludes retrial. *Bullington v. Missouri*, 451 U.S. 430 (1981); *United States v. Bibbero*, 749 F.2d 581 (9th Cir. 1984) *cert. denied*, 471 U.S. 1103 (1985).

Where reversal is not predicated on evidentiary sufficiency, a defendant's retrial following reversal is not prohibited by the double jeopardy clause. *United States v. Mize*, 820 F.2d 118 (5th Cir.) *cert. denied*, 108 S.Ct. 328 (1987). Where, however, the evidence at a defendant's first trial was factually insufficient to sustain the conviction, retrial is prohibited even where the appellant court fails or refuses to address the issue on appeal and reverses on other grounds. *United States v. Sneed*, 705 F.2d 745 (5th Cir. 1983) *See also Carter v. Estelle*, 691 F.2d 777 (5th Cir. 1982) *cert. denied*, 460 U.S.

1056 (1983). Addressing claims of evidentiary insufficiency obviously serves the interests of judicial economy and the orderly administration of justice. A defendant successfully challenging the sufficiency of the evidence at a first trial is entitled to a judgment of acquittal as opposed to the right to a new trial. It has thus been held that courts of appeals are "compelled" to address evidentiary sufficiency claims, even where reversal is required on other grounds. *United States v. Palzer*, 745 F.2d 1350 (11th Cir. 1984).

As Justice Brennan observed in his concurrence in *Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294, 321-22 (1984):

> When a defendant challenging his conviction on appeal contends both that the trial was infected by error and that the evidence was constitutionally insufficient, the Court may not, consistent with the rule of *Burks v. United States*, ignore the sufficiency claim, reverse on grounds of trial error, and remand for retrial. Because the first trial has plainly ended, "retrial is foreclosed by the double jeopardy clause if the evidence fails to satisfy the [constitutional standard for sufficiency]. Hence the [sufficiency issue] can not be avoided; if retrial is to be had, the evidence must be found to be legally sufficient as a matter of federal law to sustain the jury verdict." (Citations omitted).

The Supreme Court has noted that consideration of evidentiary sufficiency before ordering retrial is a part of an appellate court's obligation to enforce applicable state and federal laws. *Tibbs v. Florida*, 457 U.S. 31, 45 (1982). Other circuits have uniformly followed this necessary corollary to the *Burks* rule. *See United States v. Dotson*, 871 F.2d 1318, 1324 (6th Cir. 1989), vac. on other grounds, 895 F.2d 263 (1990) ("while we have already determined that the jury charge . . . was in-

adequate, we find it necessary to consider the sufficiency of the evidence issue in order to determine the proper scope of our remand. . . . The sufficiency of the evidence issue is therefore necessary to our resolution of" the appeal); *United States v. Gallo*, 782 F.2d 1191 (4th Cir. 1986), appeal after remand, 865 F.2d 1260, Cert. denied, 109 S.Ct. 2074 (1989) ("despite reversal, the legal sufficiency of the evidence is an issue before us because we must consider it in deciding whether to grant a new trial"); *United States v. Hodges*, 770 F.2d 1475, 1477 (9th Cir. 1985) ("the existence of other grounds for reversal does not relieve an appellate court of the need to first review the sufficiency of the evidence").

Panel consideration and decision on Appellant Brewer's challenge to the sufficiency of the evidence set out in Point of Error No. 5 will serve the interests of this Court, the trial court, the United States Attorney, and Appellant Brewer. Because a different form of relief, i.e., acquittal, is required in the event of a finding by this Court of insufficiency, and in light of the foregoing authorities, Appellant Brewer is entitled to have this issue addressed.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Appellant Brewer prays that this Honorable Court grant his Petition for Rehearing and address the evidentiary sufficiency issues raised and discussed in his original and reply briefs under Point of Error No. 5, and reverse his convictions on counts 2 and 3 of the superseding indictment, with instructions to the district court to enter an acquittal on those two counts.